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18
19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**
21 **SAN FRANCISCO DIVISION**

22 *IN RE: 23ANDME, INC. CUSTOMER DATA*
23 *SECURITY BREACH LITIGATION*

24 This Document Relates To: All Actions

Case No. 3:24-md-03098-EMC

**MOTION TO APPOINT THE COTCHETT-
BOTTINI TEAM AS INTERIM CO-LEAD
COUNSEL**

Date: June 13, 2024

Time: 1:30 p.m.

Judge: Hon. Edward M. Chen

Place: Courtroom 5, 17th Floor

Or as set by the Court

Pursuant to Rule 23(g) of the Federal Rules of Civil Procedure (“Rule 23(g)”) and this Court’s Civil Minutes dated February 26, 2024 (ECF No. 78), Plaintiff Rudy K. Thompson respectfully moves for an order appointing Cotchett, Pitre & McCarthy LLP (“CPM”) and Bottini & Bottini (“BB”) as Interim Co-Lead Counsel (collectively hereafter, the “CPM/BB Team”).

I. The CPM/BB Team is Comprised of a Diverse Group of Lawyers Who Have the Experience, Commitment, and Resources to Obtain Meaningful Relief for the Class

Rule 23(g) sets forth the factors courts should consider when appointing interim class counsel:

- (i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel’s knowledge of the applicable law; and
- (iv) the resources counsel will commit to representing the class.

FED. R. CIV. P. 23(g)(1)(A). In addition, the Court has identified guidelines for applicants to address, including their professional backgrounds, experience, and proposed case plan.

The CPM/BB Team brings together decades of experience in consumer class action litigation in general, and privacy and data breach class actions in particular. *See* Exhibits 1-2, attached to the Joint Declaration of Mark Molumphy and Francis Bottini filed in Support of this Motion (“Joint Decl.”).

CPM has led numerous high-profile privacy cases affecting millions of consumers (*e.g., In re Zoom Communications, Inc. Privacy Litig, In re Vizio, Inc. Consumer Privacy Litigation, In re: Lenovo Adware Litigation*), other types of consumer class actions and shareholder derivative litigation arising out of data breach and other technological vulnerabilities (*e.g., In re Apple Inc. Device Performance Litigation* and *In re Yahoo! Inc. Shareholder Litigation*), and a myriad of other types of high stakes consumer litigation, all to great success. *See* Joint Decl., Exhibit 1. Similarly, BB has substantial experience serving in leadership roles in privacy and data breach class actions, serving in leadership in both the *Zoom* and *Tiktok Consumer Privacy Litigation*. In *Tiktok*, Chang served on the Executive Committee and helped secure a \$92 million settlement. BB is also currently serving on the Executive

1 Committee in *In re Google RTB Consumer Privacy Litigation*, where the claims were previously
 2 upheld. See Joint Decl., Exhibit 2.

3 The two firms have also worked closely and effectively together. In the *Yahoo!* action, the
 4 CPM/BB Team served as co-lead counsel involving novel issues of privacy law, after Yahoo! disclosed
 5 two of the largest data breaches in history impacting 500 million and one billion of its users,
 6 respectively. The CPM/BB Team sought and obtained both monetary and injunctive relief relating to
 7 Yahoo!'s proposed merger with Verizon and inadequate disclosure of the breaches in proxy materials.
 8 The CPM/BB Team won permission to take expedited discovery and deposed Yahoo!'s Chief
 9 Information Security Officer, Alex Stamos. Citing the evidence uncovered, the Santa Clara Superior
 10 Court ultimately required Yahoo! to amend its proxy materials and, shortly thereafter, the CPM/BB
 11 Team negotiated a \$29 million derivative settlement, the nation's first derivative recovery following a
 12 data breach, and established new law that continues to have important implications for future data-
 13 breach related litigation. Similarly, in *In re Zoom Communications, Inc. Privacy Litig.*, the class
 14 plaintiffs secured a historic settlement based on allegations that Zoom (i) shared certain information
 15 with third parties, (ii) should have done more to prevent unwanted meeting disruptions by third parties,
 16 and (iii) advertised its Zoom Meetings App as being encrypted "end-to-end." Thereafter, the Team
 17 (along with co-counsel) negotiated both monetary and injunctive relief on behalf of millions of Zoom
 18 consumers.

19 Accordingly, the CPM/BB Team's deep, particularized experience will allow it to manage
 20 issues that are pivotal to the success of this case with great efficiency, including standing, technical
 21 expertise, and damage evaluation.

22 Moreover, each of the Team's members are located in California and are intimately familiar
 23 with, and have years of experience litigating cases state privacy laws. The Team's members are
 24 attorneys at firms that, together, are capable of committing, and will commit, sufficient resources to
 25 adequately represent the class. The CPM/BB Team easily satisfies the requirements of Rule 23(g).

26 Finally, the Team is diverse in gender, racial/ethnic identity, national origin, age, and life
 27 experience in compliance with the guidance provide by the Duke Law Center for Judicial Studies,
 28 *Standards and Best Practices for Large and Mass-Tort MDLs*, Best Practice 4E.

Members Of The Proposed Team

Joseph W. Cotchett is considered by plaintiffs and defense attorneys alike to be one of the most accomplished trial lawyers in the country. During his 50-plus year legal career, Cotchett has tried more than 100 cases to verdict, and settled hundreds more, winning numerous jury verdicts, ranging from multi-million dollar fraud, data breach, intellectual property, and securities jury verdicts, to several defense verdicts in complex civil cases. He successfully negotiated a multi-million-dollar settlement in a qui tam suit on behalf of the University of California and hundreds of millions of dollars in privacy, major frauds, and mass torts. Cotchett consistently has been named one of the most influential lawyers in California, has been named by the legal press as one of the top 10 trial attorneys in California, and has been listed in every edition of Best Lawyers in America since its inception.

Mark C. Molumphy is a Partner at CPM, and a native of the Bay Area, born in San Mateo, California. Molumphy joined CPM in 1993, and has over 30 years of experience practicing civil litigation with an emphasis on complex business disputes, privacy, and products liability. Molumphy has consistently been selected as one of the Top 100 lawyers in Northern California by Super Lawyers, and chairs CPM's securities litigation, consumer protection, and privacy practices. Under Molumphy's leadership, the firm's securities litigation practice ranked among the top ten in the nation by the ISS Securities Class Action Services organization in 2019. Molumphy has extensive experience as lead counsel in major consumer and privacy actions, including the *Zoom* and *Yahoo!* cases described above. More recently, Molumphy and Cotchett served as co-lead counsel in *In re Apple Inc. Device Performance Litigation*. The case related to Apple's defective operating system software, alleged violation of California and federal computer intrusion statutes, and involved extensive technical issues raised in the pleading, discovery and damages phases of the case. In addition to arguing major motions, including motions to dismiss, Molumphy helped coordinate discovery involving the review of millions of documents and depositions of Apple employees and proposed class representatives. After two years of intense litigation, Apple agreed to an historic \$500 million settlement.

Tyson Redenbarger is a Partner at Cotchett, Pitre & McCarthy LLP practicing in a wide range of civil litigation areas including class actions and complex civil litigation. In 2022, Redenbarger was listed by the Daily Journal as one of the "Top 40 Under 40" attorneys in California. Redenbarger has

1 served as plaintiffs' counsel in numerous consumer, privacy, and securities class actions in both state
2 and federal courts, including *Yahoo!* and *Zoom*.

3 **Gia Jung** is an Associate at Cotchett, Pitre & McCarthy LLP specializing in complex
4 commercial litigation and class actions. Jung has a certificate in IP & Technology law from the
5 University of California, Berkeley School of Law and speaks on technology topics, including privacy
6 and artificial intelligence, at conferences around the country. Jung has served as counsel in numerous
7 consumer, privacy, and securities class actions in both state and federal courts.

8 The CPM Firm Resume, attached to the Joint Declaration as Exhibit 1, sets forth CPM's
9 background in many different types of privacy and consumer class litigation.

10 **Frank Bottini** has extensive experience leading consumer and privacy class actions, and has
11 achieved numerous multi-million dollar recoveries in securities, consumer, privacy, and antitrust class
12 action cases throughout the country. Bottini served as co-lead counsel in the *Yahoo!* action, described
13 above, and his published cases cover the spectrum of consumer, privacy and intellectual matters,
14 including most recently, *Wilhoite v. Xiaodi Hou*, 2024 U.S. Dist. LEXIS 12040 (S.D. Cal. Jan. 23,
15 2024), where the district court granted TRO to prevent company executives from transferring
16 intellectual property to China.

17 **Albert Y. Chang** has over a decade of experience representing consumers and shareholders in
18 high-stakes litigation involving technology companies, such as Facebook, Yahoo!, Apple, and Alibaba.
19 Chang represented nonusers of Facebook in a putative class action in the Northern District of
20 California, alleging violations of the Illinois Biometric Information Protection Act, 740 ILCS 14/1 *et*
21 *seq.* In this hard-fought litigation, Chang and other attorneys at BB litigated cutting-edge, complex
22 issues, including Article III standing. Together with other attorneys at CPM, Chang also led his firm's
23 prosecution of the *Yahoo!* action, described above.

24 **Anne Beste** is a 1992 graduate of Northwestern University School of Law, and received her
25 undergraduate degree in 1989 from Boston College, where she was Phi Beta Kappa and graduated
26 magna cum laude with a B.A. in Economics. Beste, who is admitted in California, Washington, D.C.,
27 Missouri and Illinois, has practiced complex civil litigation for over two decades, with an emphasis on
28 environmental and trade secret litigation.

BB's firm resume, attached to the Joint Declaration as Exhibit 2, sets forth other firm successes in many different types of privacy and consumer class litigation.

II. The CPM/BB Team Prepared A Detailed Complaint, Following Extensive Investigation

The members of the CPM/BB Team have performed substantial work in this case, including investigating and identifying a variety of claims alleged in this consolidated action. This work is plainly reflected in their detailed complaint, which stands apart from others.

The complaint asserts fourteen causes of action specifically tailored to the specific facts of this case, including the acquisition by the hackers of ancestry information, and, for a subset of the accounts, health-related information based upon the user's genetics. The complaint also details the fact that it was not disclosed until recently that the hackers had obtained access to one of the Company's features called "DNA Relatives." When customers use this feature, select information is shared with other 23andMe customers who might be a close genetic match. By gaining access to this feature, the hackers obtained information from 5.5 million DNA Relatives' profiles. Such profiles may include a customer's geographic location, birth year, family tree and uploaded photos. The complaint also details how the hackers were also able to access the profile information of an additional 1.4 million customers by accessing a feature called Family Tree.

Significantly, the complaint specifically protects vulnerable members of the Class by alleging two subclasses. The first subclass is "All Persons of Jewish Heritage and Chinese Ancestry." See Complaint, ¶75. The second subclass is brought on behalf of a "State Genetic Privacy Statute Subclass" which includes "All individuals in the Nationwide Class who reside in Illinois, Oregon, or Alaska" and seeks recovery under those states' specific statutes.

III. The CPM/BB Team Will Allocate Work To Mimimize Duplication And Maximize Efficiencies

The CPM/BB Team have substantial experience in the prosecution of complex, consumer and privacy actions and possess the necessary resources to efficiently conduct this litigation. See Joint Decl. Exs. 1-2. In particular, the CPM Team has served as lead or co-lead counsel in many complex actions and recovered hundreds of millions of dollars for consumers as reflected by the firms' resumes. The CPM/BB Team has also worked efficiently together—and with other firms—in the past. Work will be allocated to take advantage of the particular skills and backgrounds of the attorneys, including

1 law and briefing matters overseen by Molumphy and Bottini and ESI overseen by IT experts
2 Redenbarger, Jung, and Chang. More junior attorneys and support staff will also support the initial
3 document review stages, ensuring that cost efficiencies are maintained. Because all CPM/BB Team
4 members are in California, and with most a short drive from this Court (and 23&Me's headquarters),
5 the Class will be protected from needless travel and associated expenses.

6 The CPM/BB Team also proposes a case plan to maximize such efficiency, beginning with the
7 prompt drafting and filing of a consolidated complaint, consistent with the Court's desire to expedite
8 matters once lead counsel is appointed. The CPM/BB Team has already completed a comprehensive
9 review and comparison of allegations and claims asserted in the other related actions, and identified
10 factual details to add to the consolidated complaint.

11 Since this Court has indicated that it will hold an initial CMC at the same time that it considers
12 lead counsel motions, the CPM/BB Team is prepared to discuss standard pre-trial stipulations covering
13 ESI and confidentiality, and then to move quickly thereafter to conduct a Rule 26(f) conference to set
14 a discovery plan in place. In this case in particular, it will be necessary to draft a detailed ESI protocol,
15 which CPM/BB have extensive experience with, involving some of the largest corporations in the
16 country. CPM/BB then intend to move into the document phase of discovery, followed by depositions,
17 with an aggressive schedule that aims to have class certification decided before the end of 2024. Again,
18 CPM/BB's extensive experience with this Court's rules and procedures in other complex class action
19 cases will be helpful in this MDL case. Ideally, the CPM/BB Team aims to move this case towards a
20 trial date in 2025.

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1 **IV. Conclusion**

2 For the foregoing reasons, the CPM/BB Team respectfully requests to be appointed Co-Lead
3 Interim Class Counsel.

4 Dated: April 18, 2024

/s/ Mark C. Molumphy

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15 *Attorneys for Plaintiff Rudy K. Thompson*

16 **SIGNATURE ATTESTATION**

17 I am the ECF User whose identification and password are being used to file the foregoing Motion to
18 Appoint the Cotchett-Bottini Team as Interim Co-Lead Counsel. Pursuant to L.R 5-1(i)(3) regarding signatures,
19 I, Mark C. Molumphy attest that concurrence in the filing of this document has been obtained.

20 DATED: April 18, 2023

21 /s/Mark C. Molumphy

22 Mark C. Molumphy
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